STATE OF MICHIGAN

COURT OF APPEALS

LORINE LEIGH,

Plaintiff-Appellant,

v

STUART STOLLER, D.O., KENNETH WOLOK, D.O. and TRI-COUNTY MEDICAL CLINIC, P.C.,

Defendants-Appellees.

UNPUBLISHED
April 11, 1997

No. 182135
Macomb County
LC No. 91-004719

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from a jury's determination of no cause for action in this claim of medical malpractice. We affirm.

Drs. Stuart Stoller and Kenneth Wolok were plaintiff's physicians from 1986 to 1990. Defendants treated plaintiff for her various complaints, which included chest pains, palpitations, rapid heart beat, and left arm heaviness and numbness. Defendants diagnosed plaintiff's symptoms as largely psychological in nature. In 1991, plaintiff suffered a major heart attack that left her partially debilitated. In the instant malpractice suit, plaintiff alleged that defendants were negligent in failing to diagnose and treat her angina, perform or order testing for myocardial ischemia, refer her to a cardiologist, diagnose her hypertension, and prescribe appropriate drugs and therapy to prevent her heart attack. Defendants contended that, given the symptoms and information with which plaintiff presented them, their diagnoses of plaintiff's various problems were reasonable.

I

Plaintiff first argues that the trial court abused its discretion by qualifying Dr. H. John Barklay, a general practitioner of osteopathy, as an expert witness for defendants, because he was not a family osteopathic specialist, as were defendants. We disagree.

We review a court's decision to qualify a witness as an expert for an abuse of discretion. *McDougall v Eliuk*, 218 Mich App 501, 508; 554 NW2d 56 (1996). An abuse of discretion exists only if an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification or excuse for the ruling. *Cleary v Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1994).

Plaintiff argues that Dr. Barklay was unqualified to testify as to the standard of care defendants were required to follow, because defendants were osteopathic specialists[1] and Dr. Barklay was not. Therefore, plaintiff argues that Dr. Barklay was unfamiliar with, and hence unable to offer testimony on, the standard of care that applied to defendants. Plaintiff bases her argument on MCL 600.2169(1); MSA 27A.2169(1), which at the time of trial, provided:

> (1) In an action alleging medical malpractice, if the defendant is a specialist, a person shall not give expert testimony on the appropriate standard of care unless the person is or was a physician licensed to practice medicine or osteopathic medicine and surgery or a dentist licensed to practice dentistry in this or another state and meets both of the following criteria:
>
> (a) Specializes, or specialized at the time of the occurrence which is the basis for this action, in the same specialty or a related, relevant area of medicine or osteopathic medicine and surgery or dentistry as the specialist who is the defendant in the medical malpractice action.
>
> (b) Devotes, or devoted at the time of the occurrence which is the basis for the action, a substantial portion of his or her professional time to the active clinical practice of medicine or osteopathic medicine and surgery or the active clinical practice of dentistry, or to the instruction of students in an accredited medical school, osteopathic medical school, or dental school in the same specialty or a related, relevant area of health care as the specialist who is the defendant in the medical malpractice action.

Plaintiff is correct that a nationwide standard of care applied to defendants, because they were specialists. *Birmingham v Vance*, 204 Mich App 418, 422; 516 NW2d 95 (1994). However, plaintiff's argument that Dr. Barklay was unqualified to testify as to the applicable nationwide standard of care because he was not an osteopathic specialist at the time of trial must fail. In *McDougall*, *supra*, a panel of this Court determined that § 2169(1) was unconstitutional, because it conflicted with the procedural mandates of MRE 702, which governs the qualification of expert witnesses. *Id.* at 506-507. Therefore, this Court must not examine this issue with reference to whether Dr. Barklay was an accredited specialist at the time of trial. Rather, this Court must determine whether the trial court abused its discretion in finding that Dr. Barklay possessed adequate knowledge, skill, experience, training, or education to offer an opinion as to whether defendants breached the applicable standard of care in their treatment of plaintiff. *Id.* at 508. Most importantly, this Court must determine whether Dr. Barklay had knowledge of the nationwide standard of care that applied to defendants. *Id.*

Considering the facts on which the trial court acted, we cannot state that the trial court's qualification of Dr. Barklay as an expert witness was without justification or excuse. Evidence showed that Dr. Barklay had operated a family-based osteopathic practice for 33 years. He was familiar with the procedures and medications that were significant in plaintiff's malpractice action. Dr. Barklay kept abreast of nationwide osteopathic trends and standards by reading journals and attending national seminars, and participated in a continuing medical education program. Dr. Barklay stated that he was familiar with the nationwide standard of care that applied to defendants as recognized specialists in the field of osteopathy. Based on this evidence concerning Dr. Barklay's extensive knowledge, experience, education and training, the trial court's decision to qualify him as an expert witness did not constitute an abuse of discretion.

II

Next, plaintiff argues that the trial court abused its discretion in ruling against her attempt to introduce her medical records from the General Motors Infirmary into evidence at trial. We do not agree.

At trial, plaintiff attempted to introduce into evidence her GM medical records, which apparently reflected that she displayed symptoms of hypertension from 1978, when she first visited the General Motors Infirmary, to 1986. The records also established that plaintiff was taking Aldactizide, a blood pressure medication, from approximately 1985 to 1986. Plaintiff asserted that the records were necessary to establish that defendants were negligent in failing to discover plaintiff's long, documented history of hypertension. Defendants countered that plaintiff never apprised them of the records' existence. Therefore, defendants argued, the records were irrelevant to the issue of whether they were negligent in failing to diagnose and treat plaintiff's hypertension and heart disease. The trial court ultimately ruled against admission of the records on MRE 403 grounds, finding that introduction of the records would prejudicially suggest that defendants should have been aware of them, although they had no way of knowing of their existence until plaintiff filed the instant suit. On appeal, plaintiff argues that the trial court abused its discretion in excluding evidence of the GM medical records, because it precluded her from proving that "(1) appropriate record keeping would have alerted [defendants] to a history of hypertension, and [] (2) the hypertension medication taken by Plaintiff, Aldactizide, had a direct and appreciable affect on her blood pressure thereby masking a key risk factor for coronary artery disease."

MRE 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Dacon v Transue*, 441 Mich 315, 339; 490 NW2d 369 (1992). MRE 402 provides that irrelevant evidence is inadmissible at trial. *Id.* Additionally, MRE 403 provides that the trial court may exclude even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading of the jury. *Wengel v Herfert*, 189 Mich App 427, 432-433; 473 NW2d 741 (1991). A trial court's ruling to exclude evidence is reviewed on appeal for an abuse of discretion. *Cleary*, *supra* at 507. Moreover, error requiring reversal may not

be predicated upon an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710; 550 NW2d 797 (1996).

We cannot agree with plaintiff's argument that her GM medical records were relevant. Plaintiff alleged that defendants negligently failed to (1) diagnose and treat her angina; (2) perform or order appropriate testing for myocardial ischemia; (3) refer her to a cardiologist; (4) diagnose her hypertension; and (5) prescribe appropriate drugs and therapy to prevent her heart attack. Defendants never used the GM records in treating or diagnosing plaintiff. We are unable to ascertain how the GM records, of which defendants were never made aware until trial, were relevant in making the existence of any fact in evidence more or less probable than it would be without these records. Moreover, plaintiff makes no attempt to address the trial court's determination that the records' potential for prejudice and jury confusion substantially outweighed their probative value. A party waives appellate consideration of an issue by failing to argue it on appeal. *Singerman v Municipal Service Bureau, Inc*, 211 Mich App 678, 684; 536 NW2d 547 (1995).

We further note that even if the trial court abused its discretion by preventing plaintiff from introducing the GM records, the resulting error was harmless because plaintiff had already established through expert testimony that plaintiff displayed symptoms of hypertension as early as 1978 and that she had been prescribed Aldactizide for treatment of high blood pressure. Moreover, the expert opined that defendants were negligent in failing to ascertain whether plaintiff had a significant history of hypertension and in failing to obtain the GM records. As such, the evidence plaintiff sought to introduce was merely cumulative in nature, and any error resulting from its exclusion was harmless. See *Sackett v Atyeo*, 217 Mich App 676, 685; 552 NW2d 536 (1996).

III

Next, plaintiff argues that the trial court abused its discretion in denying her motion in limine to exclude evidence of psychiatric treatment she received after her 1991 heart attack. While plaintiff acknowledges on appeal that this evidence was relevant as to the issue of whether defendants were negligent in diagnosing her as suffering from anxiety and depression, as opposed to heart disease, plaintiff contends that the probative value of this evidence was substantially outweighed by its potential for unfair prejudice. We disagree.

Because plaintiff acknowledges that this evidence had some probative value, we must address whether the trial court abused its discretion by finding in accordance with MRE 403 that its probative value was not substantially outweighed by its unfairly prejudicial effect. See *Wengel, supra*. Plaintiff generally alleges that she was prejudiced by introduction of the evidence in the sense that probative evidence of mental instability, where relevant, will always have some prejudicial or damaging effect on the party against whom the evidence is admitted. See *Byrne v Schneider's Iron and Metal, Inc*, 190 Mich App 176, 181; 475 NW2d 854 (1991). However, plaintiff fails to establish that the probative value of evidence of her psychiatric problems was substantially outweighed by its unfairly prejudicial effect. Plaintiff generally avers, without support, that "a jury is less willing to provide monetary compensation to one who is not in complete control of [her mental] faculties." Even if this were so, the

trial court explicitly instructed the jury to consider whether defendants were negligent *before* addressing the issue of monetary damages. Since the jury found that plaintiff failed to establish negligence on defendants' part, it never approached the issue of compensation. Therefore, plaintiff complains of unfair prejudice that, logically, never befell her. Accordingly, we affirm the trial court's ruling against plaintiff's motion in limine to exclude evidence of her psychiatric treatment.

IV

Lastly, plaintiff argues that the trial court abused its discretion in refusing to grant her motion for a mistrial when defendant Dr. Stoller commented during his testimony that he had never been sued before, because the comment's prejudicial and inflammatory nature had the effect of denying plaintiff a fair trial. We disagree.

During redirect examination, defense counsel asked Dr. Stoller to describe how he had been trained as a doctor. At the close of his unobjected-to, lengthy narrative on the subject of his education, Dr. Stoller stated that the practice of medicine was "very interesting, [and] also very stressful." In reference to plaintiff's suit, Dr. Stoller added, "Times like these aren't relished. Thank God this is the only time." Defendant objected to Dr. Stoller's statement and moved the trial court to declare a mistrial in response to the testimony on the grounds that the statement was so prejudicial that a curative instruction would be useless in addressing its adverse effect. The trial court denied plaintiff's request to strike Dr. Stoller's entire answer as an improper narrative response, because plaintiff's counsel had an opportunity to object, but did not. The trial court instructed the jury to ignore Dr. Stoller's comment as unresponsive and took plaintiff's mistrial motion under advisement, ultimately refusing to grant it.

A trial court may grant a mistrial when a voluntary statement from a witness is of such a nature as to preclude the possibility of a fair trial by improperly influencing the jury. *Secrist v Detroit*, 299 Mich 393, 397; 300 NW 137 (1941). The statement must be considered in light of its attending circumstances and the question propounded. *Id.* Generally, however, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). We review the trial court's decision to deny plaintiff's mistrial motion for an abuse of discretion resulting in a miscarriage of justice. *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992).

Considering the facts upon which the trial court acted, we cannot say that the trial court's denial of plaintiff's mistrial motion was without justification or excuse. Plaintiff argues first that defense counsel's question to Dr. Stoller was improper because it called for a narrative response. The trial court controls the scope and order of the interrogation of witnesses within its sound discretion; nothing in the rules specifically precludes testimony because of its narrative form. MRE 611(a); *People v Wilson*, 119 Mich App 606, 617; 326 NW2d 576 (1982). Therefore, we find nothing improper in defense counsel's question.

As for the comment itself, plaintiff fails to support her argument that it was of such a prejudicial nature as to deny her the possibility of a fair trial. Indeed, plaintiff only advances that Dr. Stoller's

comment was, by law, presumed prejudicial. However, the case she cites in support of this proposition dealt with a defense attorney's mention that a plaintiff suing for negligence had recourse to an insurance policy, a comment that was presumably prejudicial. See *Kokinakes v British Leyland, Ltd,* 124 Mich App 650, 652-653; 335 NW2d 114 (1983). We are unable to find further support for plaintiff's proposition that Dr. Stoller's comment was prejudicial. Moreover, the comment was isolated and was not repeated again during the lengthy trial. There is no indication from the record that defense counsel purposefully elicited it. Additionally, the trial court issued a prompt instruction to the jury to ignore Dr. Stoller's comment. We presume the jury followed this instruction. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Lastly, there is no reason for this Court to assume that the jury was unable to take a critical view of Dr. Stoller's transparently self-serving comment. Accordingly, we hold that the trial court did not abuse its discretion in denying plaintiff's motion for a mistrial.

Plaintiff further argues that the trial court failed to declare a mistrial in response to defense counsel's allegedly prejudicial conduct at trial and a courtroom observer's statement to the effect that plaintiff should win her lawsuit, which was overheard by one juror.

With respect to defense counsel's allegedly improper conduct, plaintiff failed to bring a motion for mistrial. Therefore, this issue is unpreserved for our review absent a showing of manifest injustice. *Taubitz v Grand Trunk Western Railroad Co,* 133 Mich App 122, 129-130; 348 NW2d 712 (1984). After thorough consideration of the issues and the record, we determine that plaintiff has failed to establish that our refusal to review this unpreserved allegation of error will result in manifest injustice. Additionally, plaintiff explicitly waived her right to a mistrial in relation to the observer's allegedly prejudicial comment. Plaintiff may not now assert that the trial court's failure to declare a mistrial in response to the comment constituted an abuse of discretion. *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302, 323-324; 553 NW2d 377 (1996). Moreover, the trial court polled the jury and determined that the comment had no effect on the jurors' ability to remain impartial and fair.

We affirm.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen

[1] Both parties seem to agree that Drs. Stoller and Wolok are specialists by virtue of the fact that they passed the qualifying examination to become family osteopathic practitioners. However, this Court has stated that board certification is not a necessary prerequisite for designation as a specialist. *Dunn v Nundkumar*, 186 Mich App 51, 53; 463 NW2d 435 (1990). Nonetheless, we will assume for the purposes of plaintiff's argument that defendants are actually specialists.